PP

v.

AMIR DAGANG

HIGH COURT SABAH & SARAWAK, SANDAKAN
YEW JEN KIE JC
[CRIMINAL APPEAL NO: 42-06-2008]
15 JANUARY 2009

CRIMINAL LAW: *Anti-Corruption Act 1997 - Section 15(1) - Offence of using position for gratification - Allegation of - Headmaster appointed business entity owned by him and his wife to supply goods and services to school - Whether prima facie case established - Elements to be proven - Whether presumption under s. 15(2) could be invoked - Whether fact that Headmaster had declared his interest to members of AJK Kewangan rebutted presumption under s. 15(2) - Whether failure of prosecution to call complainant to give evidence was fatal to prosecution's case*

EVIDENCE: *Witness - Calling of witness - Failure to call complainant and investigating officers in corruption trial - Whether fatal - Complainant not directly involved in commission of offences - No gap created in prosecution's case despite non-calling of complainant and investigating officers*

The respondent (accused in the lower court) was charged with eight separate charges under s. 15(1) of the Anti-Corruption Act 1997 ('the Act'). The crux of the eight charges was that the respondent as an officer of a public body, namely, Headmaster of Sekolah Kebangsaan Sungai Anib 1 ('the School'), Sandakan, had used his office for gratification when he appointed Nurakmal Enterprise, which was jointly owned by him and his wife, as the school's supplier of various goods and services through several local purchase orders ('LPOs'). The respondent was, after a full trial, acquitted and discharged without being called upon to give his defence on the grounds that the appellant had failed to make out a *prima facie* case on the eight charges. The learned trial judge found that based on the minutes of meeting of Jawatankuasa Kewangan of the School, the respondent had declared his interest in the company and that the members of AJK Kewangan were aware of it. The respondent merely suggested that the company be appointed for convenience to speed up the supply, but it was the members of the Jawatankuasa Kewangan that appointed the company as the supplier. On this basis the learned trial judge found that the respondent had rebutted

A on the balance of probability the presumption under s. 42 of the Act that he used his office for gratification. The learned judge also found that the failure in calling the complainant P. Ganeson and other investigating officers had deprived the court of conducting a maximum evaluation of all the evidence in determining whether B there was a *prima facie* case or otherwise. The Public Prosecutor appealed against the acquittal and discharge.

Held (allowing appeals; ordering for defence to be called):

(1) It was incumbent upon the prosecution to prove the following C ingredients for the purpose of establishing a *prima facie* case: (i) that the respondent was a public officer, namely, a Headmaster of the School; and (ii) that the respondent used his office for gratification by appointing Nurakmak Enteprise, a company belonging to him and his wife for supplying/repairing works at D the School under the LPOs. Upon proof of the above ingredients, the statutory presumption under s. 15(2) of the Act would be invoked and it will therefore be presumed that the respondent had used his office for gratification. The appellant had proven the first ingredient. (paras 13, 14 & 16)

E **(2)** The signing of the eight LPOs and giving of the invoices to issue the LPOs constituted taking actions in relation to matters in which the respondent and his wife had an interest. The learned trial judge therefore had erred in deciding that the appellant had failed to make out a *prima facie* case. (para 20)

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(3) The learned trial judge had not fully taken into consideration the significant material fact that the respondent being the Headmaster was the most senior member in the Jawatankuasa Kewangan. After having proposed the company to be the G supplier and disclosing that the company belonged to his wife, he did not disqualify himself and let the other senior officers in the School to take over the meeting. He remained physically present throughout the meeting and during the decision making. The respondent should have declared his interest as well as disqualified himself during the meeting to avoid conflict H of interest in view that the company was owned by him and his wife. Failure to do so is regarded in law as to have used his public position or office for his pecuniary or other advantage. (paras 26, 27, 37 & 39)

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(4) Even without the statutory presumption, the appellant had adduced ample credible evidence to show that the respondent had used his position as Headmaster of the School for gratification. Accordingly, the learned trial judge had erred by deciding that the appellant failed to make out a *prima facie* case and that the respondent had rebutted the presumption on the balance of probability. (para 50)

(5) The report made by P. Ganeson was not the first information report. If P. Ganeson were called, his evidence would have amounted to hearsay evidence as he was not directly involved in any manner in the commission of the offences under appeal. The non-calling of P. Ganeson and the investigating officers had not created a gap in the case of the prosecution as alleged. (paras 54 & 56)

Case(s) referred to:
Ab Malek Atan v. PP [2002] 6 CLJ 405 HC ***(dist)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Datuk Sahar Arpan v. PP [2007] 1 CLJ 326 CA ***(refd)***
PP v. Dato Haji Mohamed Muslim Haji Othman [1982] 1 LNS 71 HC ***(refd)***
PP v. Datuk Tan Cheng Swee & Anor [1980] 1 LNS 58 FC ***(refd)***
Wong Voon v. PP (Criminal Appeal No 24 of 1984) (Unreported) ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 15(1), (2), 42, 53(1)
Emergency (Essential Powers) Ordinance No. 22/1970, s. 2(1)

For the prosecution - Raja Zaizul Faridah DPP
For the respondent - Zahir Shah; M/s ZahirShah & Zulaiha Chiew Advocates & Solicitors

Reported by Amutha Suppayah

JUDGMENT

Yew Jen Kie JC:

Introduction

[1] The respondent (accused in the lower court) was tried in the Sessions Court, Sandakan, with eight separate charges under s. 15(1) of the Anti Corruption Act 1997 ("the Act"). All the eight charges were jointly tried.

[2] The crux of the eight charges is that the respondent as an officer of a public body, namely, Headmaster of Sekolah Kebangsaan Sungai Anib 1 ("the school"), Sandakan, had used his office for gratification when he appointed Nurakmal Enterprise, which was jointly owned by him and his wife Marliana binti Radin, as the supplier of various goods and services between 30 January 2003 to 1 July 2003.

[3] The respondent was, after a full trial, acquitted and discharged without calling upon to give his defence. The appellant now appeals against the order of acquittal and discharge.

The case for the prosecution

[4] The case of the prosecution is that the respondent was the Headmaster of the school since 16 May 1998 until 1 December 2003. The respondent and PW12 Marliana binti Radin are husband and wife. They were the co-proprietors of Nurakmal Enterprise ("the company") for year 2003 as evidenced by the trading license marked P4.

[5] PW3 Noraini binti Nuri, Pembantu Tadbir N17 of the school, gave evidence that she issued numerous local purchase orders, namely, P5(c), P6(c), P7(c), P8(c), P9(c), P10(c), P11(b) and P12(c) (collectively referred to as the eight LPOs) based on the invoices, namely, P5(d), P6(d), P7(d & e), P8(d), P9(d & e), P10(d), Part 11(c & d), P12(d) (collectively referred to as "the invoices") given to her by the respondent. The invoices were issued by the company. The respondent signed all the LPOs.

[6] According to PW12, the invoices were prepared with the help of her husband the respondent.

[7] PW11 Evey Lolita binti Ahmad, Pembantu Tadbir Bank Pertanian, gave evidence that the company had an account with Bank Pertanian Cawangan Sandakan under the name of the respondent and his wife, PW12. A copy of Nurakmal Enterprise Business License No. R. 36895/03 ie, P16(d) was annexed to the application which shows that the respondent and PW12 were business partners.

[8] PW14 Suaib bin Sanudin, Penolong Pengarah Tadbir Kewangan Bank, gave evidence that based on the signatures on Kad Permohonan Membuka Akaun Nurakmal Enterprise ie, P16(a), the respondent had made withdrawal of twenty one pieces of Bank

Pertanian Withdrawal Slips ie, P27(a-u) from the company's bank account since 24 February 2003 until 31 December 2003. This is confirmed by the Print Screen Computer Print out ie, P28(a-c).

[9] PW2 Datu Thomas Lau Chi Keong, Timbalan Residen II of Majlis Perbandaran Sandakan from 1969 until 2005, gave evidence that based on the trading license ie, P4, Nurakmal Enterprise's registered owners were the respondent and his wife, PW12.

[10] PW7 Tasiah bt. A. Damit, Pembantu Tadbir Majlis Perbandaran Sandakan, testified that based on the Notis Makluman Perubahan Butir Lesen Berniaga & Senarai Semak ie, P13(a)(b) and (c), the name of the respondent as one of the owners was cancelled on 15 December 2003.

The Decision of the Trial Judge

[11] After a full trial, the learned trial judge acquitted and discharged the respondent on the finding that the appellant had failed to make out a *prima facie* case on the eight charges. The reasons for the finding are as follows:

a. Based on the minutes of meeting of Jawatankuasa Kewangan of the school ie, exhs. D1 to D6, the respondent had declared his interest in the company and that the members of AJK Kewangan were aware of it. The respondent merely suggested that the company be appointed for convenience to speed up the supply, but it was the members of the Jawatankuasa Kewangan that appointed the company as the supplier. On this basis the learned trial judge found that the respondent had rebutted on the balance of probability the presumption under s. 42 of the Act that he used his office for gratification.

b. The failure in calling the Complainant P Ganeson and other investigating officers had deprived the court of conducting a maximum evaluation of all the evidence in determining whether there was a *prima facie* case or otherwise.

The Appeal

[12] Although numerous grounds of appeal have been set out in the petition of appeal, they may in my view be grouped into the following grounds:

A a. Whether *prima facie* has been established (Ground 3.1).

b. Whether the respondent used his office for gratification (Grounds 3.2, 3.3. and 3.4).

c. Whether failure to call P. Ganeson and other investigation
B officer is fatal (Ground 3.5).

Court's Decision

Whether The Appellant Had Made Out A Prima Facie Case

C **[13]** In the context of the eight charges preferred against the respondent, it is incumbent upon the prosecution to prove the following ingredients for the purpose of establishing a *prima facie* case. These essential ingredients are:

D i. That the respondent is a public officer, namely, a Headmaster of the School and

ii. The respondent used his office for gratification by appointing Nurakmak Enteprise, a company belonging to him and his wife, Marliana binte Radin for supplying/repairing works at the
E school through the eight LPOs.

[14] Upon proof of the above ingredients, the statutory presumption under s. 15(2) of the Act is invoked and it is therefore presumed that the respondent had used his office for gratification.

F **[15]** Section 15(2) of the Act states:

> (2) For the purpose of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for gratification when he makes any decision, or takes any action, in relation to any matter in which such officer, or any
G relative or associates of his, has any interest, whether directly or indirectly.

[16] It is not in dispute that the appellant has proven the first ingredient.

H **[17]** It is the contention of the appellant that the respondent had abused his officer as headmaster by appointing the company owned by him and his wife PW12 to be the supplier of the school. It is submitted that it has been established through the evidence of PW3 that PW3 received the following invoices: P7(d & e) for the 3rd
I charge, P8(d) for the 4th charge, P9 (d & e) for the 5th charge, P10(d) for the 6th charge, P11 (c & d) for the 7th charge, and P12

(d) for the 8th charge from the respondent, except for P5(c) for the 1st charge, and P6(d) for the 2nd charge which she received from the company and P12(d) for the 8th charge from PW8. It is also the testimony of PW3 that she received the above invoices prior to the issuance of the eight LPOs, which she prepared based on the particulars in the invoices supplied to her. The eight LPOs, were duly signed by the respondent. She also confirmed that the respondent instructed her to process all the documentations involving the company and submit them to Jabatan Akauntan Negara for payment.

[18] It is further submitted that the connection of the respondent with the company is clearly established through the trading licence marked P4 which shows that the respondent and his wife PW12 were registered owners of the company. P16(a) also show that the respondent and PW12 are the rightful holders of the company's account with Bank Pertanian Cawangan Sandakan.

[19] It is next submitted that the act of the respondent in issuing the eight LPOs to the company by signing thereon and also giving the invoices of the company to PW3 to issue the LPOs means that the respondent had appointed the company as supplier for the school. Hence, pursuant to the presumption under s. 15(2) of the Act, the respondent is presumed to have used his office for gratification, unless the contrary is proven.

[20] I have no reason to disagree with the above contention. In my judgment, the signing of the eight LPOs and giving of the invoices to issue the LPOs constitute taking actions in relation to matters in which he and PW12 had interest. Accordingly, I agree with the appellant that the learned trial judge had erred in deciding that the appellant had failed to make out a *prima facie* case.

Whether The Respondent Had Used His Office For Gratification

[21] In essence the contention under this ground of appeal is whether the respondent had rebutted the presumption that he had used his office for gratification as the learned trial judge had found that he had.

[22] For the respondent, it is contended that it is of prime importance to determine whether the eight LPOs were issued and the invoices were received before the meeting of the Jawatankuasa Kewangan. Just by looking at the dates of the LPOs does not help to tell whether they were issued before or after the Jawatankuasa

A Kewangan meeting. However, reading PW3's evidence that before any items were ordered a meeting was first held between the teachers including the respondent to discuss the matter (p. 161 lines 4000-4005 nop) together with the minutes of the meeting, namely, D1 to D6 in respect of the eight charges, it shows that the B meetings were already held in the morning on the same day on which the eight LPOs were issued. D1 to D6 show that during those meetings the members of Jawatankuasa Kewangan had unanimously agreed to appoint the company to supply those items.

C **[23]** It is further contended that similarly PW3 received the invoices from the respondent only after the Jawatankuasa Kewangan meetings that were held on the same date as the invoice. During the meetings the members of Jawatankuasa Kewangan had already unanimously agreed to appoint the company as the supplier.

D **[24]** It is next submitted that contrary to the submission of the appellant, the mere act of the respondent in giving those LPOs to PW3 cannot be taken as an act of the respondent appointing the company as the supplier. It was merely an administrative duty that was performed by him after the members of the Jawatankuasa E Kewangan had unanimously decided to appoint the company as the supplier in all the eight charges.

[25] In his grounds of judgment the learned trial judge made a finding that the respondent had rebutted the presumption by reason that during the Jawatankuasa Kewangan meeting the respondent had F declared his interest in the company when he proposed the company to be the supplier so that the supply would be speedy, and that the members of the Jawatankuasa Kewangan had a final say in appointing the supplier and that they were free to give their views.

G **[26]** After a careful perusal of the grounds of judgment, I would agree with the appellant that the learned trial judge in arriving at the above findings had not fully taken into consideration the other significant material facts.

[27] The other significant facts are as follows: The respondent H being the headmaster was the most senior member in the Jawatankuasa Kewangan. After having proposed the company to be the supplier and disclosing that the company belonged to his wife, he did not disqualify himself and let the other senior officers in the school to take over the meeting. On the contrary, he remained I physically present throughout the meeting during which the members were said to be free to express their views. He was also physically present during the decision making.

[28] The questions are posed: How independently and freely the members of Jawatankuasa Kewangan could express their views in the presence of their superior? How would the members of the Jawatankuasa Kewangan dare to overrule their superior who had expressly suggested the company to be appointed as the supplier and gave the reasons for its appointment, in his presence? A B

[29] It is significant to note that the respondent did not reveal his own interest in the company. This begs the following question: If the respondent had seen it fit to call for a meeting to declare his wife's interest in the company before the decision on the appointment was made, why did he not also disclose the fact that he was the co-owner of the company? Being fully apprised of his own interest in the company, why did he not disqualify himself and delegate to the other senior officers like Puan Hang Hung Keang (Penolong Kanan 1) and Siti Asia Mohaamad (Penolong Kanan HEM) to chair the meeting so as to avoid the conflict of interest? C D

[30] What are the implications to be drawn from the material facts referred to above? The offence under s. 15 of the Act is very similar in nature to s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970, namely, using public position for pecuniary advantage. The intention of s. 15(1) of the Act and s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 is to ensure that the holders of public offices do not use their office for pecuniary gain or advantage. It is therefore the duty of such officers to ensure that they are free of conflict of interest in the decision making process. The principles pronounced in cases under s. 2(1) of the Emergency (Essential Powers) Ordinance are therefore applicable to cases under s. 15 of the Act. It can be seen from the following authorities that to ensure an absence of conflict of interest, there must not only be a declaration of interest in the matter but also to disqualify oneself, which includes not to be physically present during the meeting. E F G

[31] In *Wong Voon @ David Wang Chang Vun v. PP* (Criminal Appeal No. 24 of 1984 – In the matter of Criminal Case No. 1 of 1983 in the Sessions Court at Kota Kinabalu), the appellant Wong Voon was charged for committing corrupt practice by signing and authorizing Local Purchase Orders (LPOs) to a company owned by his wife, brother and wife of the appellant's assistant director, Simon Punai. The appellant claimed that exhs. D3 and D2 absolved him when he signed the four LPOs which were the subject of the charges against him. D3 was a letter written by the appellant giving H I

a list of the companies which were willing to supply, one of the companies being "Momboh Enterprise" of which the appellant's wife, brother and wife of the appellant's Assistant Director had an interest. D2 was a reply of the Minister which the appellant took to be authority to purchase from a company he had interest and that he could sign the LPOs and payment vouchers. Cheques were issued for the works in the LPOs signed by the appellant and credited to "Momboh Enterprise" account. This account was opened with the accused and Simon Punai as introducers. There were various withdrawals for the purchase of the house for the appellant's brother-in-law, purchase of a piece of land for a company belonging to the appellant's wife and Simon Punai's wife, the opening of fixed deposit account for RM50,000 by the appellant.

[32] The court in *Wong Voon, supra*, had this to say on the need to declare the interest and to disqualify oneself:

> After having correctly apprised himself of the legal position if Momboh was to be constituted the supplier and so that his position and his interest would not conflict, the Appellant's duty was to do or to have done 2 things in order to be free of that conflict and to insist that they are done. The steps are: (1) he must declare his interest and this he had done and most important; (2) he must disqualify himself. This can only mean that the Ministry or some more senior officials in the Ministry must decide but certainly not the Appellant.

[33] To illustrate how the appellant could disqualify himself, the court in *Wong Voon, supra*, referred to *PP v. Datuk Tan Cheng Swee & Anor* [1980] 1 LNS 58, when Chang Min Tat FJ, said:

> ... and if Datuk Tan had correctly advised himself to disqualify himself and to refer the plans to the State authority for his action, the plans would have been passed. By not doing so he had clearly committed the offence with which he was charged ...

[34] On physical presence at the meeting, in *PP v. Dato Haji Mohamed Muslim Haji Othman* [1982] 1 LNS 71, Hashim Yeop A. Sani J (as he then was) held:

> The next question which follows is whether the physical presence of the accused at the Exco meeting which passed the application was sufficient in the circumstances for him to be regarded in law to have used his public position or office for his pecuniary or other advantage. In my view, the answer is in the affirmative. If the Exco meeting on October 4, 1975 were to be regarded as a play his silence did not make the accused any less an actor in the play.

[35] In *Datuk Sahar Arpan v. PP* [2007] 1 CLJ 326, the accused faced three charges under s. 2(1) of the Emergency (Essential Powers) ordinance No. 22/1970. The essence of the three charges was that the accused at three separate meetings held at the meeting room of the Melaka State Executive Council (Exco), had committed corrupt practice by using his public position for his pecuniary advantage in that he took part in the meeting and decision of the Exco in relation to three separate applications by one Ivory Heights Sdn. Bhd. in which he had an interest. Low Hop Bing JCA referred to the case of *PP v. Dato Haji Mohamed Muslim Haji Othman* [1982] 1 LNS 71 HC, and held:

> The physical presence of an accused who was an EXCO member at the relevant EXCO meeting which approved his application was sufficient in the circumstances for him to be regarded in law to have used his public position or office for his pecuniary or other advantage and his silence did not make him any less an actor in the play, even when his application had already been duly processed and the land office had allotted to him a piece of land in the area earmarked of EXCO members, and the land committee had approved his application even prior to the EXCO's deliberation and approval

(The above decision of the Court of Appeal was affirmed by the Federal Court, but the judgment thereof has yet to be published).

[36] Learned counsel for the respondent submits that *Wong Voon*'s case, *supra* is distinguishable from the present case. In that case there was a list of companies that were willing to supply the goods and so in that case, surely the appellant should have disqualified himself during the meeting. Whereas in the present case, there was no other company in any list prior to the meeting or that were suggested during any of the numerous Jawatankuasa Kewangan meetings.

[37] With respect, I do not agree. In my opinion, it is immaterial whether there was a list of prospective companies or just one prospective contractor for the project or contract. The important thing is that the respondent should declare his interest as well as disqualify himself during the meeting to avoid conflict of interest in view that the company was owned by him and his wife PW12.

[38] Learned counsel for the respondent further contends that the case of *Dato Haji Mohamed Muslim*, and *Datuk Sahar Arpan, supra*, are also distinguishable from the present case because firstly, in those cases obviously there was a requirement for a meeting to take

A place which is not the case in the present case. Secondly, the accused in both those cases had not declared their interest during the meeting.

[39] Again, I respectfully beg to differ. While it is true that the
B respondent was authorized to award the project summarily without calling for a meeting where the amount is below RM10,000, the fact that he had decided to call for the meeting of the Jawatankuasa Kewangan when it was not required of him shows that he was aware of the conflict of interest. Being aware of the conflict of
C interest which came into play here, he should in the light of the authorities cited above, make a full disclosure of his interest, disqualify himself and to request a senior officer to chair the meeting. Failure to do so is regarded in law as to have used his public position or office for his pecuniary or other advantage.

D **[40]** In *PP v. Dato Haji Mohamed Muslim Haji Othman* [1982] 1 LNS 71, Hashim Yeop A. Sani J held:

> Here *mens rea* is proved if the accused knew or ought to have known of the conflict between his public duty as member of the Exco and his private interest in the approval of the application.

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[41] The respondent had sought to rely on D1 to D6 to show that the respondent had openly informed everyone present at the meeting that the company belonged to his wife and then left the decision to the floor as way of showing that he was acting in good
F faith. This begs the question on why the respondent did not disclose that he had a share in the company.

[42] On the respondent's failure to disclose that the company was jointly owned by him and PW12, the learned trial judge was of the view that it would be of no consequence if the respondent had told
G the members during the meeting that the company was jointly owned by him and his wife since the consequence of such would have been the same, namely, that he had already declared to them that he had an interest in that company.

H **[43]** With respect, I find the learned trial judge had failed to realize that the eight charges expressly state that the respondent had used his public position for gratification by appointing the company belonging to him and his wife as supplier of the school. The implication of the conduct in failing to disclose his own interest in the company is that the respondent knew or ought to have known
I of the conflict between his public duty as the principal of the school and his interest in the company as co-owner.

[44] Learned counsel for the respondent submits that there appears a plausible reason why the respondent did not inform those present at the meeting about him being the co-owner of the company. It is that, in all probability he was not a co-owner yet at that time but was co-owner only after the last meeting had taken place. This plausibility comes about from the date appearing in the trading license ie, P4 wherein the date appears as 17 July 2003. Even if that were not so, surely one cannot say for certain whether the date is "17 July 2003" or "17 January 2003". If the date in P4 is read as "17 July 2003", it would mean that the last meeting of Jawatankuasa Kewangan held on 1 July 2004 was two weeks before the date the respondent was registered as co-owner of the company. It is submitted that there is a doubt on the issuing date of the trading licence. This doubt had not been clarified by failure on the part of the appellant in calling the person who wrote the date in P4.

[45] To my mind, there is no doubt whatsoever that the trading license was issued on 17 January 2003. I say so for the following reasons. PW11 testified that based on P16 (a-e), the respondent and PW12 on 31 January 2003 went to Bank Pertanian Cawangan Sandakan and applied to open a "Giro-Patriot Perdana account" for the company. A copy of the trading license ie, P16(d) was annexed to the application and P16(d) shows that the respondent and PW12 are business partners.

[46] PW11 disagreed in cross-examination when it was put to her that it is normal in Malaysia that when we know someone in the bank, it is possible to open an account without the complete supporting documents. She was very positive that the application to open account would not have been approved if the documents were not complete. PW11 is certain that the trading license was already ready at the time of the application. It was put to PW11 – and, disagreed by her – that the applicants forgot to bring the trading licence, and that, as PW11 knew them, she allowed the account to be opened first and the license to be furnished later.

[47] P16(d) is the photocopy of P4. Given that P16(d) was already in existence at the time when the application for account with Bank Pertanian was made on 31 January 2003, logic dictates that it is highly improbable for P4 to have been issued on "17 July 2003" as contended by the respondent. Accordingly, the contention that there is doubt as to whether the date in P4 is "17 July 2003" or "17 January 2003" holds no water.

[48] It is pertinent to take note of the following material facts:

a. The respondent failed to declare his own interest in the company;

b. He suggested to the committee members for the company to be selected for the works;

c. He was the most senior and held the high-ranking post in the meeting;

d. Committee members were his subordinates;

e. He chaired the meeting and was physically present throughout the meeting;

f. He failed to delegate the company's application to other senior officials; and

h. instead he prepared the company's invoices and gave them to PW3 for PW3 to issue the LPOs which he duly signed.

[49] The accumulative effect of the above conducts clearly evinces the respondent's intention not to disqualify himself or to avoid conflict of interest. In failing to divorce himself completely from the necessity of having to make the decision, it is sufficient in the circumstance to regard him in law to have used his pubic position for gratification.

[50] In my judgment, even without the statutory presumption, the appellant had adduced ample credible evidence to show that the respondent had used his position as Headmaster of the school for gratification. Accordingly, the learned trial judge had erred by deciding that the appellant has failed to make out a *prima facie* case and that the respondent had rebutted the presumption on the balance of probability.

Failure To Call P Ganeson And Other Investigating Officers

[51] The complaint here is directed at the learned trial judge's decision that failure of the appellant to call the complainant P. Ganeson and other investigating officers to testify had deprived the court from conducting a maximum evaluation of all the evidence for the prosecution.

[52] Learned counsel for the respondent argues, amongst others, that in the light of the evidence that all those items listed in the eight LPOs had been satisfactorily supplied according to the specification given by the school and that the respondent did not receive any pecuniary interest from the supplies, so why was there a report made against the respondent in the first place? What was the matter complained against the respondent by the complainant?

[53] Against this backdrop of facts, it is argued that it is reasonable for the respondent who is being accused of these offences and more so for a trier of fact to at least know the substance of the complaint. Further, the respondent should be allowed to cross examine the complainant to get to the truth of the accusations, to find out whether the complaint made to the ACA was because of a *personal animus* against the respondent or because someone's company was no longer given the task to supply to the school. More importantly, through the cross-examination of the complainant, it will assist the respondent to unveil the truth and exonerate him of all charges.

[54] It must be noted that P. Ganeson cannot be the original complainant because he had no dealing with the school over the subject matter in the eight charges. As such, the report made by P. Ganeson is not the first information report. (See *Balachandran v. PP* [2005] 1 CLJ 85). If P Ganeson were called, his evidence would have amounted to hearsay evidence as he was not directly involved in any manner in the commission of the offences under appeal. (See *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705).

[55] As P. Ganeson was not personally involved in any manner with the case under appeal, it is fair to say that in all probability the complaint was received under s. 53(1) of the Act. Pursuant to s. 53(1) of the Act, the identity of the informant and the information referred to in the complaint shall be secret between the officer making the complaint and the informant and shall not be disclosed or, be ordered or, required to be disclosed in any civil, criminal or other proceedings in any court. In other words, even if P. Ganeson were called, he is bound by the provision under s. 53(1) ACA 1997 not to divulge the identity of the informant. Under the circumstances, the reason advanced by the respondent as to why P. Ganeson must be called is a non-starter.

[56] In my opinion, the learned trial judge's reliance on the case of *Ab Malek Atan v. PP* [2002] 6 CLJ 405, is misplaced as that case is distinguishable from the cases under appeal. In *Ab Malek Atan's* case the evidence of Jeffery and the FIR was needed to corroborate the testimony of the rape victim in view of the conflicting evidence to show the consistency to the story. In the present case, the prosecution had called all the necessary witnesses to unfold the narrative on which the prosecution's case is based. In my opinion, the non-calling of P. Ganeson and the investigating officers has not created a gap in the case of the prosecution as alleged.

[57] For the reasons stated above, this ground of appeal must fail for being devoid of merit.

Conclusion

[58] In my judgment, the appeal ought to be allowed as the appellant has established a *prima facie* case against the respondent on all eight charges by having proven all the essential ingredients of the offence in all the charges.

[59] The learned trial judge erred in law and in fact by deciding that the presumption under s. 15(2) had been rebutted on the balance of probability in failing (1) to appreciate the fact that exhs. D1 to D6 could not absolve the respondent from the commission of the offence of corrupt practice of using his position to his advantage and (2) to consider that by issuing the eight LPO's to a company which the respondent had interest in, the respondent had indeed committed an offence under s. 15(1) of the Act.

[60] I therefore allow the appeal by setting aside the order of acquittal and discharge and substitute it with an order that the respondent be called upon to enter his defence.